SUPREME COURT U. S.

FILED
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IN THE

Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted] 195

LAWRENCE D. SULLIVAN,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1969

No.

LAWRENCE D. SULLIVAN,

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COMMISSIONER OF INTERNAL REVENUE,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled matter on the 6th day of March, 1969.

I. Opinion Below

The United States Court of Appeals for the Second Circuit affirmed the decision of the Tax Court of the United States without opinion (Appendix 1a).

The Memorandum Findings of Fact and Opinion upon remand of the Tax Court of the United States is reported at T. C. Memo. 1968-144 (Appendix 2a).

The reversing and remanding opinion of the United States Court of Appeals for the Second Circuit is reported at 368 F. 2d 1007 (CA 2, 1966) (Appendix 9a).

The original Findings of Fact and Opinion of the Tax Court of the United States is reported at 45 T.C. 217 (Appendix 13a).

II. Statement of Jurisdiction

The judgment of the Court of Appeals was made and entered on March 6, 1969 (Appendix 1a).

There was no order respecting a rehearing nor granting extension of time within which to petition for certiorari.

The jurisdiction of this Court is conferred by Sec. 7482(a) of the Internal Revenue Code of 1954, and 28 U.S.C. Sec. 1254(1).

The jurisdiction of the Court of Appeals is found in the Internal Revenue Code of 1954 Sec. 7482(a) and 28 U.S.C. Sec. 1254(1).

The jurisdiction of the Tax Court of the United States is found in the Internal Revenue Code of 1954, Sec. 7442.

III. Question Presented for Review

Are the automobile transportation expenses of a worker who must carry tools to be apportioned between the person of the worker and his tools, in order to find his taxable income?

IV. Statutes Involved

INTERNAL REVENUE CODE OF 1954

Sec. 162(a):

> "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year carrying on any trade or business."

"Sec. 262.

PERSONAL, LIVING AND FAMILY EXPENSES. Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses."

INCOME TAX REGULATIONS

"§ 1.162-1. Business expenses. (a) In general. * * * Among the items included in business expenses are * * * operating expenses of automobiles used in the trade or business, * * *."

REVENUE RULING 63-100 (Cum. Bull. 1963-1, 34):

"Where it is necessary for a musician to use his automobile to transport his musical instruments between his residence and his place of work because they are too bulky to be carried otherwise, and he would not use his automobile on such trips except for that reason, his transportation expenses are deductible under section 162 of the Internal Revenue Code of 1954.

Such transportation expenses are ordinary and necessary expenses paid or incurred in carrying on his trade or business because they are occasioned primarily by the necessity for transporting bulky musical instruments even if such expenses would otherwise be nondeductible commuting expenses.

Whether transportation expenses are incurred primarily for business or personal reasons is a question of fact to be determined in each case.

Revenue Ruling 56-25, C.B. 1956-1, 152, states that expenses incurred by an employee in using his automobile for commuting between his place of abode and his principal or regular place of work represent nondeductible personal expenses notwithstanding the fact that the automobile is also used to transport tools used by the employee in his work. That ruling is hereby modified to remove the implication that such transportation expenses would not be deductible even if the employee would not have used his automobile on such trips but for the necessity of taking his tools with him."

V. Statement of the Case

Taxpayer Lawrence D. Sullivan, a wirelather foreman, resided in Staten Island, New York, and was employed during the year 1962 by John Melen, Inc., of New York City.

He worked at several locations within New York City. It was necessary for him to transport his tools by his car from his residence to and from work, because no means of storage was feasible at the work sites and because of the weight of the tools. Taxpayer would have driven to work absent the necessity of transporting his tools. The Tax Court allocated $136.57 of the reasonable expenses of $409.70, that is one-third to the transportation of tools, without explanation or rationale, of the Court's random selection of this ratio.

Neither of these facts are in dispute and no other facts are material to this case.

The Commissioner of Internal Revenue issued a notice of deficiency (Appendix 37a) under Sec. 6212(a) of the Internal Revenue Code of 1954 in respect of the Federal income tax of the petitioner. Consequently the basis for the Federal jurisdiction in the Tax Court of the United States is Sec. 7442 of the Internal Revenue Code of 1954.

VI. Argument

A. Reasons relied on for the allowance of the writ.

(i) There are already hundreds of cases suspended in different Federal Courts and Administrative Agencies, awaiting outcome of the present case.

The confusion inherent in the Court of Appeals decision is a lighted fuse which will lead to an explosion of cases upon the Tax Court and other Federal Courts.

(ii) The Court of Appeals has rendered in the instant case a decision in conflict with the decision of the Court of Appeals for the Ninth Circuit on the same matter in *Crowther* v. *Commissioner of Internal Revenue,* 269 F.2d 292 (Appendix 20a).

(iii) The decision of the Court of Appeals is in conflict with the position of the respondent clearly expressed in *Tyne* v. *Commissioner of Internal Revenue,* 385 F. 2d 40 (Appendix 36a).

B. The findings of the two Courts below were not concurrent.

The Tax Court originally disallowed any deductions of transporting petitioner's tools (Appendix 13a). Upon appeal the Court of Appeals allowed said deduction, but ordered that

> "The Tax Court should then determine whether taxpayer would have driven to work absent the necessity of transporting his tools, * * *. If so, it should allocate those expenses between transportation of taxpayer and of his tools and allow the latter as a deduction, * * *."

When the Tax Court upon remand and direction obeyed the order, made the determination and the allocation, the Court of Appeals upon the second appeal, by upholding the Tax Court decision only applied the rule of the "Law of the Case", *i.e.* its own former judgment.

Accordingly the second decision of the Tax Court and the second judgment of the Court of Appeals only carried out the mandate of the Court of Appeals without changing the situation, that the findings of the two Courts below were not concurrent.

C. As to the Merits.

The decisions of the Second and the Ninth Circuits are consonant as to that a worker may deduct from his taxable income the expenses of automobile transportation of his

tools, provided such transportation is necessary, because of the weight or bulkiness of said tools, plus lack of any means of safe storage at the work site. But said Courts differ, whether all, or only an apportioned part of the car expense is deductible.

1. If it is necessary to carry his tools by automobile, this disconnects the hypothetical inclination of the taxpayer, of driving or not driving by car to his work site in the hypothetical case of what he would have done absent the necessity to carry the tools.

2. The deductibility itself is unquestionably conditioned upon the necessity to carry the tools. A solution which is based on the intent of the workman, loses sight of the physical necessity which is the basis of the tax-deductibility.

3. The question is not: how would the workman go to his job site absent the necessity to carry his tools, but whether he could go in any other manner than by car, because the weight etc. of his tools. He could not. The tools must in any event arrive to the job site. Without this, the arrival of the workman is useless, naught. Whether or not the workman would use his car to transport himself, can have no bearing on a case where necessity is present for getting the tools to the job site.

4. The Court of Appeals based its judgment on the following reasoning:

> "If taxpayer had engaged someone to transport him, and paid separately for transportation of himself and his tools, the cost of transporting the tools would clearly be deductible. We see no reason why the rule should differ when the taxpayer drives himself." (Appendix 11a).

The personal aspect of taxpayer's residence becomes irrelevant, when it becomes necessary for the taxpayer to take home his tools for lack of means of safe storage at the work site, and having to do this by car, because of weight or

bulkiness of the tools. In such a case the transportation of the taxpayer's body from his residence to his work site is entirely a business matter, primarily and inextricably a matter of carrying the tools.

As the Ninth Circuit said in *Crowther* v. *Commissioner of Internal Revenue*, 269 F. 2d 292:

> "The necessity of daily transporting his tools from his layout in the woods, to Fort Bragg, for the purpose of repair or replacement, appears important to us. This was a business necessity, rather than a personal necessity. * * *
>
> The automobile and jeep were * * * property 'used in the trade or business.' The operating expenses of the automobile and jeep were 'ordinary and necessary expenses paid or incurred . . . in carrying on the trade or business of the taxpayer.' We do not believe that they could be called 'personal living or family expenses.'' The expenses were required by the exigencies of the business.

5. In any case, it is clear, that either *Crowther* is right or the judgment of the Second Circuit is right: both cannot coexist.

VII. Conclusion

For all the foregoing reasons, a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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212—LE 5-4195

GABRIEL T. PAP
of Counsel

Order of the Court of Appeals for the Second Circuit, Entered March 6, 1969

Supreme Court of the United States

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of March one thousand nine hundred and sixty-nine.

Present:

HON. J. EDWARD LUMBARD, *Chief Judge,*
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges.

LAWRENCE D. SULLIVAN,
Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal from the Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States , and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED MARCH 6, 1969
A. DANIEL FUSARO, Clerk
#388

Memorandum Findings of Fact and Opinion of the Tax Court of the United States Upon Remand— T. C. Memo. 1968-144

T. C. MEMO. 1968-144

TAX COURT OF THE UNITED STATES

—0—

LAWRENCE D. SULLIVAN,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

—0—

Docket No. 2904-64

Filed July 9, 1968.

GABRIEL T. PAP, for the petitioner.

AGATHA VORSANGER and WILLIAM T. HOLLORAN, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

MULRONEY, *Judge*: In *Lawrence D. Sullivan*, 45 T. C. 217 (1965), this Court upheld respondent's determination disallowing in its entirety a deduction claimed by petitioner in 1962 for a total of $1,494.72 for transportation expenses for the use of his car in driving to and from his home in Staten Island, New York, and the various construction job sites in New York City where he worked as a wire lather. Petitioner always took his bag of tools with him on these

Memorandum Findings of Fact and Opinion of the Tax Court of the United States Upon Remand— T. C. Memo. 1968-144

trips. In *Sullivan* v. *Commissioner*, 368 F. 2d 1007 (C.A. 2, 1966), the United States Court of Appeals for the Second Circuit reversed and remanded the decision of this Court. Upon remand, we are directed to make the following determinations: (1) Whether it was necessary for taxpayer to transport his tools to and from work; (2) whether some alternative means of storage was feasible and, if so, the cost of this alternative should represent the maximum allowable deduction for transportation of the tools; (3) whether taxpayer would have driven to work absent the necessity of transporting his tools; (4) if not, taxpayer should be allowed to deduct his reasonable driving expenses, subject to the above maximum; (5) if so, those expenses should be allocated between transportation of the taxpayer and of his tools, with the latter allowed as a deduction, again subject to the maximum; and (6) in either case, to determine how much of the $1,494.72 deduction originally claimed by the taxpayer represents reasonable driving expenses.

Additional evidence was introduced by the parties at a further trial held by this Court in New York City on August 24, 1967. Petitioner has abandoned his claim that his deductible transportation expenses in 1962 were $1,494.72 and now contends that the amount of $409.70 represents transportation expenses properly deductible by him in 1962.

Findings of Fact

The facts as found in our prior opinion in this case are herein incorporated by this reference.

Petitioner is a resident of Staten Island, New York. His employer during 1962, John Melen, Inc. of New York City, was a subcontractor engaged in the business of metal

furring and lathing. Most of the work done by John Melen, Inc. was alteration work rather than new construction work.

During 1962 the petitioner, in his capacity as wire-lather foreman, worked at the following locations:

Week Ending	*Date*	*Job Site*
Jan. 3	2, 3	Assumption School, Staten Island
Jan. 10	4	Assumption School, Staten Island
	5, 8	S. I. Hospital, Staten Island
	9, 10	Jr. High School 27, Staten Island
Jan. 17	11	Jr. High School 27, Staten Island
	12, 15	10 W. 57th St., Manhattan
	16, 17	59 Mott Street, Manhattan
Jan. 24	All dates	Public School 305, Brooklyn
Feb. 7	All dates	Public School 305, Brooklyn
Feb. 14	All dates	Public School 305, Brooklyn
Feb. 21	15, 16	2 Broadway, Manhattan
	19, 20, 21	4 Albany Street, Manhattan
Feb. 28	All dates	4 Albany Street, Manhattan
Mar. 7	All dates	4 Albany Street, Manhattan
Mar. 14	All dates	4 Albany Street, Manhattan
Mar. 21	15, 16, 19	4 Albany Street, Manhattan
	20, 21	2 Broadway, Manhattan
Mar. 28	22	2 Broadway, Manhattan
	23	141 Broadway, Manhattan
	26	4 Albany Street, Manhattan
	27, 28	141 Broadway, Manhattan
Apr. 4	Mar. 29, 30	2 Park Row, Manhattan
	Apr. 2, 3, 4	130 William Street, Manhattan

Memorandum Findings of Fact and Opinion of the Tax Court of the United States Upon Remand— T. C. Memo. 1968-144

Week Ending	*Date*	*Job Site*
Apr. 11	All dates	Beth Israel Hospital, Manhattan
Apr. 18	All dates	Beth Israel Hospital, Manhattan
Apr. 25	19, 20	Sutton Theatre, Manhattan
May 2	2	145 E. 32nd Street, Manhattan
	3	145 E. 32nd Street, Manhattan
	4	550 Park Avenue, Manhattan
	7, 8, 9	Public School 27, Staten Island
May 16 through Oct. 17	All dates	Public School 27, Staten Island
Oct. 24 through Nov. 28	All dates	St. Peters High School, S. I.

The distance between petitioner's residence in Staten Island and his various job sites in Manhattan was 10 or 11 miles. The distance from petitioner's residence to Public School 27 in Staten Island is about 6 miles, and the distance from his residence to St. Peters High School in Staten Island is about 5¼ miles.

During 1962 the petitioner drove his 1957 Porsche, which he purchased on May 25, 1959 for $3,025, between his home and the job sites and always took his bag of tools with him on these trips. The gasoline consumption by the Porsche was about 23 or 24 miles per gallon. Petitioner travelled a total of approximately 14,000 to 15,000 miles in his automobile during 1962. Petitioner made expenditures of $436.98 for repairs to his automobile and $196.06 for automobile insurance during 1962.

The round-trip fare for the ferry from Staten Island to Manhattan was $.90. Petitioner incurred parking fees of

about $2 per day when he drove to job sites away from Staten Island. When petitioner worked at job sites in Staten Island he did not park his car in a parking lot. Petitioner was reimbursed $.25 per day for travel expenses when he worked in Staten Island.

At some job sites tool boxes provided by the contractor were available for the storage of tools. Guards were usually present at job sites involving new construction work. John Melen, Inc., petitioner's employer, reimbursed its employees for the expense of replacing their tools if such tools were stolen while stored overnight at the job sites.

Petitioner has a permanent knee disability for which he collects disability benefits from the United States Government.

Train service was available through the center of Staten Island. Bus transportation, which was also available, would sometimes involve a mile or two of walking by the petitioner.

It was necessary for petitioner to transport his tools to and from work. Petitioner would have driven to work absent the necessity of transporting his tools.

Opinion

It fairly appears from the record that it was necessary for petitioner to transport his tools to and from work. He testified that he did not leave his tools at the job sites for fear they would be stolen and because his employer might call him in the evening to go to another job the next day. We do not believe that petitioner had any alternative means of storage at the job sites. In this

Memorandum Findings of Fact and Opinion of the Tax Court of the United States Upon Remand—
T. C. Memo. 1968-144

respect we have considered the testimony of respondent's witness and it is evident that storage facilities were not available at all sites and even where such facilities were provided it is not at all certain whether they were safe. There was testimony that there was usually a guard at new construction sites but we fail to see the relevance of this since the record is clear that most of the work performed by petitioner's employer was alteration work rather than new construction work. Furthermore, the testimony of respondent's witness, who was secretary of petitioner's employer, showed that job assignments for the next day were occasionally changed after the end of the working day and we feel that petitioner was justified in bringing his tools home each night in the event of such a possibility.

Petitioner contends that the amount of $409.70 represents his deductible transportation expenses in 1962. He computes this figure on brief by adding his expenditures for gasoline, oil and lubrication, repairs, insurance, parking, ferry and depreciation to get a total of $1,926.40. Petitioner then obtains a figure of 13.76¢ per mile by dividing the total expenditures of $1,926.40 by his total mileage for 1962 (14,000 miles) and then applies the 13.76¢ rate to the total mileage from petitioner's residence in Staten Island to the various job sites (3,250 miles) to get $447.20. Petitioner then deducts from this figure the travel expense reimbursements of $37.50 received from his employer to obtain the amount of $409.70.

We believe that petitioner has established that he incurred the various expenditures that make up the computation. It is admitted by respondent that petitioner expended $436.28 for repairs and $196.06 for insurance, and

we feel that there is sufficient evidence in the record to support the expenditures for the remaining items.[1]

But we disagree with petitioner's contention that the entire amount of $409.70 is deductible. The evidence shows that petitioner would have driven to work absent the necessity of transporting his tools. With reference to public transportation in Staten Island, where petitioner lived, he testified that "[s]ometimes you might be able to get a bus. There is only one train running down the middle of Staten Island, and sometimes the buses would involve a mile or two of walking from the bus." Petitioner testified that, in view of this, it was more convenient to drive his automobile to work. There is also evidence that petitioner had a bad knee which would lead him to prefer driving to work rather than use public transportation.

In accordance with the mandate directing us to make an allocation of expenses between the transportation of the taxpayer and of his tools, and using our best judgment and taking into consideration the entire record we find, and so hold, that $136.57 of the transportation expenses of $409.70 is allocable to the transportation of tools and therefore deductible by petitioner.

Decision will be entered under Rule 50.

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[1] It is significant that respondent in his original brief made a computation for purposes of argument of petitioner's automobile expenses applicable to business in the amount of $421.74.

Opinion of the Court of Appeals for the Second Circuit—368 F. 2d 1007 (1966)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 90—September Term, 1966

(Argued November 16, 1966 Decided December 2, 1966)

Docket No. 30627

LAWRENCE D. SULLIVAN,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Before:

LUMBARD, *Chief Judge*,
MEDINA and KAUFMAN, *Circuit Judges*.

Petition by taxpaper to review a decision of the Tax Court which disallowed a deduction of $1,494.72 claimed as expenses of transporting taxpayer's tools to and from work.

Reversed and remanded.

GABRIEL T. PAP, New York, N. Y., *for petitioner*.

HOWARD M. KOFF, Department of Justice, Washington, D. C. (Mitchell Rogovin, Assistant Attorney General, Lee A. Jackson and Meyer Rothwacks, Department of Justice, Washington, D. C., on the brief), *for respondent*.

Opinion of the Court of Appeals for the Second Circuit—368 F. 2d 1007 (1966)

LUMBARD, *Chief Judge:*

This petition by the taxpayer, Lawrence D. Sullivan, to review a decision of the Tax Court, 45 T.C. 217 (1965), which denied him a deduction of $1,494.72 for the expenses of driving his automobile between his home and job sites during 1962, requires us to determine the criteria governing deductibility of expenses of traveling to and from work when the taxpayer also transports tools which he must use in his work.

Taxpayer, who lived on Staten Island, worked for a contractor as a wire lather at various construction sites in Manhattan, Brooklyn, and Staten Island during 1962. He always took his tool bag, which measured some six by eighteen by twenty-four inches and weighed about thirty-two pounds when filled with tools, to and from work. He stated that he did not leave the bag overnight at the job sites both because he feared it might be stolen and because his employer might direct him to report at a different job site the next morning. Taxpayer also testified that he had a bad knee which made walking and standing difficult, and that commuting by public transportation, at least to some job sites on Staten Island, would have required "a mile or two of walking."

The Tax Court disallowed the driving expense deduction in its entirety, relying upon the established general rule that expenses of commuting from home to work and back are not deductible as business expenses, even where they are made necessary or increased by a physical disability of the taxpayer. See, e.g., *Commissioner* v. *Flowers*, 326 U.S. 465, 472-74 (1946); *Donnelly* v. *Commissioner*, 262 F. 2d 411 (2 Cir. 1959); *John C. Bruton*, 9 T.C. 882 (1947). It reasoned that this rule should apply whether or not the taxpayer must transport tools to and from work,

"without regard to whether his tools are light or heavy and without regard to whether they are few or many." 45 T.C. at 220.

The Commissioner concedes on this appeal that so sweeping a disallowance was error. He urges that the rule should be that taxpayer may deduct reasonable driving expenses if he can show that he would not have driven his automobile to work if it had not been necessary to take his tool bag. Cf. Rev. Rul. 63-100, 1963-1 Cum. Bull. 34. The Commissioner recognizes that, because of taxpayer's bad knee, this showing may be difficult to make, and on oral argument even suggested that we might resolve this issue against taxpayer on the transcript of his testimony in the Tax Court.

We agree with the rule suggested by the Commissioner, as far as it goes. But we hold that the deductibility of expenses of transporting tools to and from work should not be so narrowly limited. Even if taxpayer would have driven to and from work had it not been necessary to transport his tools, he ought to be allowed to deduct that portion of his reasonable driving expenses which is allocable to the transportation of tools. This was the rule the Tax Court first adopted, but overruled by its decision in the present case. See, e.g., *Charles Crowther*, 28 T.C. 1293 (1957), rev'd on another ground, 269 F. 2d 292 (9 Cir. 1959); *Francis Eaton*, 17 T.C.M. 60 (1958).

This rule reflects the dual character of taxpayer's transportation expenses much more fairly than would a rule requiring that his tools be his only reason for driving. Moreover, if taxpayer had engaged someone to transport him, and paid separately for transportation of himself and his tools, the cost of transporting the tools would clearly be deductible. We see no reason why the rule should differ when the taxpayer drives himself. Allocation of traveling expenses between business and personal purposes, such as this rule requires, is not novel. For example, where a

journey is made primarily for business but partly for personal reasons, its expenses may be allocated between the two purposes. Rev. Rul. 56-168, 1956-1 Cum. Bull. 93.

Thus the case must be remanded to the Tax Court. The Tax Court should first determine whether it was necessary for taxpayer to transport his tools to and from work. If some alternative means of storage was feasible, the cost of this alternative should represent the maximum allowable deduction for transportation of the tools. The Tax Court should then determine whether taxpayer would have driven to work absent the necessity of transporting his tools, an issue on which we do not think that taxpayer's testimony that he had a bad knee is conclusive. If not, it should allow taxpayer to deduct his reasonable driving expenses, subject to the above maximum. If so, it should allocate those expenses between transportation of taxpayer and of his tools and allow the latter as a deduction, again subject to the maximum. In either case, the Tax Court must determine how much of the $1,494.72 deduction claimed, which seems large but presumably includes ferry and all day parking expenses, represents reasonable driving expenses, since the parties stipulated only the costs of repairs and insurance.

Reversed and remanded.

Original Findings of Fact and Opinion of the Tax Court of the United States— 45 T. C. 217 (1965)

45 T. C. No. 19

TAX COURT OF THE UNITED STATES

Docket No. 2904-64

LAWRENCE D. SULLIVAN,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Filed November 30, 1965.

Petitioner, a construction worker, used his car to transport himself and his 32 pound bag of tools from his home to various job locations where his employer was constructing buildings. He also brought his tools home with him because of the danger they might be stolen and because he might be assigned to a different job location the next day. *Held*, the amounts paid for such transportation were personal expenses and not deductible as business expenses.

GABRIEL T. PAP, for the petitioner.
JOEL KAMENS, for the respondent.

MULRONEY, *Judge*: Respondent determined a deficiency in petitioner's 1962 income tax in the amount of $540.10. The issue that is left after certain concessions is whether

petitioner, a construction worker, is entitled to deduct travel expenses in traveling in his automobile between his home and various job sites in New York.

Findings of Fact

Some of the facts have been stipulated and they are found accordingly.

Upon his income tax return for 1962, which petitioner filed with the district director of internal revenue, Manhattan, New York, he took deduction for a total of $1,494.72 for transportation expenses for the use of his car in driving to and from his home in New York and the various job sites in New York where he worked as a wire lather. This claimed deduction was disallowed in the notice of deficiency.

Petitioner's employer, John Melen, Inc., had an office at 150 West 54th Street, approximately 10 miles from petitioner's home but it was petitioner's job to go directly from his home to the job site to which he was assigned by his employer. Petitioner usually drove his car, which was a 1957 Porsche, to and from the construction sites and it is stipulated that during 1962 petitioner worked for his employer at various locations in New York where schools, hospitals, and other public and private buildings were being constructed by his employer. The trips involved are trips between petitioner's home and the construction sites, and not trips from one construction site to another. Petitioner always took his bag of tools with him on these trips. These were tools he owned and used on the job, consisting of hammers, chisels and other small tools. The bag was about 24 inches by 18 inches by 6 inches and filled with tools it would weigh about 32 pounds. He did not leave his tools at the job site for fear they would be stolen and also because his employer might call him in the evening to go to another job the next day.

Original Findings of Fact and Opinion of the Tax Court of the United States—45 T. C. 217 (1965)

OPINION

On his income tax return petitioner estimated 67 percent of his total automobile expenses and automobile depreciation was applicable to his claimed business use of the automobile in making the trips between his home and construction sites. Not all of the claimed transportation expenses was substantiated. However, we need not go into the question of substantiation for petitioner's first burden was to show that the transportation expenses were ordinary and necessary expenses paid in carrying on his trade or business. Section 162(a), Internal Revenue Code of 1954. It has long been held that commuting expenses, or the expense of travel between one's residence and place of employment, are nondeductible personal expenses. Sec. 1.162-2 Income Tax Regs. In *William L. Heuer, Jr.*, 32 T.C. 947 at p. 951 (affd. per curiam 283 F. 2d 865), we said:

> The courts have always recognized a distinction between expenses of traveling incurred in carrying on a trade or business and commuting expenses, that is, those incurred in going from one's residence to one's place of work and return. The latter have always been held to be nondeductible personal expenses, as distinguished from business expenses. * * *

Petitioner seems to argue that the transportation expenses here involved were something other than commuter expenses because (1) the travel was to and from his home and various temporary job sites, and (2) his job required him to carry heavy bulky tools and therefore the car was being used for business transportation. There is no merit in his first contention. The fact that the petitioner traveled from his home to his employer's several different job locations to perform his work does not make the travel expenses anything other than commuting expenses. Petitioner's employment is to be viewed as constituting one single job to

perform services for his employer at various job sites in New York City. He was not performing services "while away from home" within the language of section 162 (a) (2), Internal Revenue Code of 1954, so that statute, and the cases and Commissioner's regulations involving that statute, or involving away from home travel expenses, have no application here.

Our opinion in *Charles Crowther*, 28, T.C. 1293 (1957)[1] indicates that it was respondent's position in that case that where commuter expense of the employee was increased because of tool transportation, an allocable portion of the transportation expense, representing such increase, would be allowed as a business deduction.[2] Respondent's present position is contained in his Ruling 63-100, C.B. 1963-1, 34[3]

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[1] Reversed as to disallowance of amount held to be commuting expenses of the employee under the very special facts of that case. 269 F. 2d 292 (C.A. 9, 1959).

[2] The opinion in *James A. Kistler*, 40 T.C. 657, which announces much the same rule as appeared in *Crowther*, was withdrawn by order of this Court but notation of the withdrawal was inadvertently omitted from Volume 40 of our reports, but an errata sheet to this effect will appear in Volume 44 now being compiled for publication.

[3] The cited ruling provides in the first part that commuter expenses of a musician carrying bulky musical instruments would be a business deduction. The last paragraph of the ruling reads as follows:

> Revenue Ruling 56-25, C.B. 1956-1, 152, states that expenses incurred by an employee in using his automobile for commuting between his place of abode and his principal or regular place of work represent nondeductible personal expenses notwithstanding the fact that the automobile is also used to transport tools used by the employees in his work. That ruling is hereby modified to remove the implication that such transportation expenses would not be deductible even if the employee would not have used his automobile on such trips but for the necessity of taking his tools with him.

and what he now states on brief should be the governing principles when deduction is sought by an employee for commuter trips where tools are transported.[4]

It has been the uniform holding of all courts that automobile expenses of an employee in driving his car to and from work are nondeductible "personal" expenses under section 262, Internal Revenue Code of 1954. *Commissioner* v. *Flowers,* 326 U.S. 465. Such expenses fall within the general category of commuter expenses similar to streetcar fare or bus fare expenses paid by an employee getting from his residence to his place of employment and back to his residence at the end of the work day.

Automobile expenses of a taxpayer's personal car become deductible only when the car is actually used in the taxpayer's trade or business and such use is ordinary and necessary in carrying on that trade or business. Such a deduction is sanctioned by section 162 (a), Internal Revenue Code of 1954, which states: "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *". As stated earlier, the employee's expenditure's for trips to and from work have always been held to be nondeductible personal expenses. Such trips are not business trips. This is true without regard to the distance traveled. In *Commissioner* v. *Flowers, supra,* where it was held the expenditures for travel to and from work were personal, the Supreme Court said "whether he traveled three

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[4] Respondent states on brief: "The standard applicable to this case is that set forth in Rev. Rul. 63-100, C.B. 1963-1, 34. Has the petitioner shown that he used his automobile on such trips *primarily* for business, rather than for personal, reasons? Has he shown that he would not have used his automobile merely in commuting to his job sites, but instead would have used some less expensive form of transportation, except for the necessity of taking with him tools too bulky to be carried otherwise? Such evidence is a prerequisite to the deduction * * *".

blocks or three hundred miles to work, the nature of these expenditures remained the same."

It is also true that the expenditures by the employee for such to and from work trips would be personal without regard to whether he used his own automobile or other public or private transportation facilities. And we are of the opinion that the expenditures of the employee for such to and from work trips are personal without regard to whether he carries the tools of his trade with him on such trips. The character of the trips as being personal commuter trips is not altered by the fact that the employee brings his tools along with him.

It has long been held that it is immaterial that a special mode of commuter transportation is necessitated by the employee's physical disability. *John C. Bryton*, 9 T.C. 882. The expenditure for such transportation is still personal. In *Commissioner* v. *Flowers, supra*, the Supreme Court said: "The character of such [commuting] expenses is unaltered by the circumstance that the taxpayer's post of duty was in Mobile, thereby increasing the costs of transportation, * * *". If the great distance an employee travels to and from work, necessitating large business expenses does not make the trips business trips, then the same result should follow when the tools an employee carries to and from work are bulky, necessitating increased trip expenses. We think it is immaterial that the circumstances of carrying tools dictate a certain mode of travel to and from work and the character of the expenditures for that travel is not made business expenditures because the commuting expense was thereby increased. We fail to see why transporting the worker to and from work would be nonbusiness trips and transporting the worker's tools on such trips would be business trips. Such expenses of the trips made by the employee from his residence to his place of employment and back home at the close of the work day, where he brings his tools along with him are personal, without regard to

whether his tools are light or heavy and without regard to whether they are few or many.

As indicated earlier in footnote 4, respondent states on brief that if the employee transported tools in his car on such commuter trips and the tools are too bulky to be carried otherwise and if he shows that except for the necessity of transporting his tools he would not have used his car on such trips, then a business use for the car would be established. We cannot agree that such a statement or the ruling on which it is based announces the correct guiding principles applicable when tools are transported on commuter trips. The determination as to whether trips to work and back home are personal or business trips cannot be made to depend on any balance of advantage, convenience, or even necessity of one form of transportation over another.

We do not find it necessary to make any finding with respect to whether the tools were light and compact or so heavy and bulky as to make private automobile transportation necessary or even more convenient. We also do not feel called upon to make any finding as to whether petitioner would or would not have used his car if it were not for the necessity of transporting tools. We are of the opinion that all such trips by an employee between his home and place of employment are personal commuter trips, whether he carries no tools, one small tool, or a car full of the tools of his trade. It is to be pointed out we are here dealing only with an employee whose place of employment is other than his home and the transportation is not from one job site to another.[5]

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[5] The opinion in *Rice* v. *Riddell*, 179 F. Supp. 576 (S.D. Calif. 1959), cited by petitioner held that a casual musician who transported his tuba and bass violin to engagements was entitled to deduct transportation expense from his home to places where he worked. However, the opinion was careful to point out the taxpayer operated his business from his home.

Decision of the United States Court of Appeals for the Ninth Circuit in Crowther v. Commissioner of Internal Revenue, 269 F. 2d 292

We hold the employee's trips to and from work which could only be characterized as nonbusiness trips when no tools are carried, are not transformed into business trips of the employee by his carrying his tools to and from his place of employment. Petitioner's automobile was not used on business trips and, therefore, his automobile expenses cannot be allowed as a deduction.

Decision will be entered under Rule 50.

Decision of the United States Court of Appeals for the Ninth Circuit in *Crowther v. Commissioner of Internal Revenue*, 269 F. 2d 292

Charles Crowther and Ivy L. Crowther, Petitioners,

v.

Commissoner of Internal Revenue, Respondent.

U. S. Court of Appeals, Ninth Circuit, No. 15,994, July 29, 1959. 269 F.2d 292.

28. TC 1293 (opinion by Withey, J.) reversed in part and affirmed in part. Years 1951 and 1954. Decision in part for Government and in part for taxpayer.

1. Tax Court of the U.S.—Jurisdiciton.

Tax Court had jurisdiction, regardless of the motives of the Government in setting forth these deficiencies.. The taxpayer's unproved allegations that the Government acted in an arbitrary manner does not affect the right of the Tax Court to decide the case on its merits.

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2. DEDUCTIONS—TRADE OR BUSINESS—LOCAL TRANSPORTATION EXPENSES.

Auto expenses held deductible by taxpayer using car and jeep to travel to log sites to fell trees and cut them into logs. He supplied all tools and transported damaged tools between the log site and his home. Taxpayer proved that he was usually carrying tools in the car. There was no public transportation available to the log sites nor was transportation provided by the employer. Duration of job was determined by employer. The Government's contention rejected that taxpayer's tax home was the various layouts in the woods where he worked. The Court held, that the vehicles were used "while away from home in the pursuit of a trade or business" and allowed the deduction.

3. DEDUCTIONS—TRADE OR BUSINESS EXPENSES—TRANSPORTATION OF TOOLS.

Deduction allowed for costs of transportation of personal tools to log site by employee felling trees and cutting them into logs.

LOWER COURT ISSUES NOT DECIDED ON APPEAL:

Estimation of expenses under the Cohan Rule.

MORRIS M. GRUPP, LEON SCHILLER, San Francisco, Calif. for Petitioner.

CHARLES K. RICE, Asst. Atty. Gen., CAROLYN R. JUST, LEE A. JACKSON, ROBERT N. ANDERSON, JAMES P. TURNER, Attys., Dept. of Justice, Wash., D.C., for Respondent.

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Petition to Review a Decision of the Tax Court of the United States.

Before: CHAMBERS, HAMLIN and JERTBERG, Circuit Judges.

HAMLIN, *Circuit Judge:*

Charles Crowther and Ivy L. Crowther, hereinafter called petitioners, received from the Commissioner of Internal Revenue notices of deficiency in income tax for the years 1951 and 1954. Within 90 days thereafter petitioners filed petitions in the Tax Court of the United States asking for a redetermination of those deficiencies. Following a trial and decision of the Tax Court, petitioners filed a petition for a review by this Court. No question is raised as to the jurisdiction of the Tax Court nor of this Court.

The case involves income tax deductions for the years 1951 and 1954. The two cases were consolidated for trial in the Tax Court. The Internal Revenue Act of 1939 is applicable to the 1951 tax return, and the Internal Revenue Act of 1954 is applicable to the income tax return of 1954. However, there is no appreciable difference between the pertinent provisions in the 1939 or in the 1954 Act. Therefore the same general principles govern the two cases.

Petitioners make generally two claims of error on the part of the Tax Court. We will discuss the second claim first.

Petitioners in their complaint filed in the Tax Court made allegations in some detail that the Commissioner acted in an arbitrary manner in finding the deficiencies in petitioners' returns, in failing to furnish petitioners with a 30-day letter (not required by law), and in failing to make a proper investigation before sending out the 90-day deficiency notices. No evidence was offered by petitioners in support of these allegations.

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[1] The propriety of the motives of the Commissioner in giving the notice of deficiency is immaterial. Kerr v. Bowers (2d 1933), 66 F.2d 419; Greene v. Commissioner, 1925, 2 B.T.A. 148; Southern California Loan Assoc., 1926, 4 B.T.A. 223; Levine Bros. Co. v. Commissioner, 1926, 5 B.T.A. 689. It was the duty of the Tax Court to determine the amount of taxpayers' deficiencies, if any, regardless of the motive of the Commissioner in setting forth these deficiencies. We find no error on the part of the Tax Court in refusing to consider this claim.

The important question involved in this case is whether certain automobile and jeep expenses incurred by Charles Crowther, hereinafter called taxpayer, in traveling from his residence in Fort Bragg to various job sites in 1951 and 1954 are deductible by him, or whether, as the Tax Court found, those expenses are divisible into (1) personal expenses of "commuting" to his work and (2) business expenses of transporting tools and equipment used by him in his employment.

The taxpayer lived in Fort Bragg, California, with his wife and three children during all of the time in question. In 1951, the two older children were of school age and attended schools in Fort Bragg.

In 1951 taxpayer was a "faller" and a "bucker" who worked in the general area surrounding Fort Bragg. In his occupation he was required to go to various log sites or "layouts" to fall trees located thereon, and to cut these trees into logs. His compensation was received from various lumber companies on the basis of the number of board feet of trees which were felled and cut into logs. The various places of his operation were determined by the lumber companies owning the timber. His job was to cut all the timber upon a particular log site.

In 1951 he was employed by the Rockport Redwood Mills, whose main office was at Roekport, California, a

small town completely owned by the lumber company located about 29 miles north of Fort Bragg. The log sites where taxpayer did his work were located some 13 to 15 miles from Rockport, and taxpayer was required to go over private logging roads to reach the log site. One road into the timber country was used by him in good weather, and in winter time another road through the timber was used. In 1951 he traveled daily about 40 miles each way between Fort Bragg and the log sites, consuming approximately four hours per day. He had no definite hours of work. Under the terms of his employment he supplied his own transportation and tree and log-cutting equipment which consisted of chain saws, chains, bars, spring boards, gunsticks, axes, sledge hammers, wedges, safety hats, caulk boots, and various minor tools.

In 1951 he worked on three separate log sites about five or six miles apart from each other. The practice was to work upon a particular "lay out" until it was all logged out. The company then directed him to work at another log site until that was logged out.

No living accommodations were available in the woods at any of the log sites worked by the taxpaper in either 1951 or 1954.

In the actual operations of bucking and falling timber, two sized chains are used and two sizes of bars. It is necessary to have extra bars and chains because many times they are bent or broken when a tree starts to fall. It was necessary to have extra equipment in order to keep the work moving. This extra equipment and spare parts were generally carried in an automobile. In the operations, tools were frequently broken or bent, axe handles broken and axes dulled, and parts were broken on the saws. All these had to be taken back to Fort Bragg for repair or replacement. The evidence showed that very seldom did the taxpayer leave the woods without bringing back something

to be repaired. When some part of the saw was broken, the taxpayer would take that off, bring it back to town and either repair it himself or buy a new part for it if it was not repairable. Carried in the automobile, also, daily back and forth from the job, were extra sledge hammers, extra axes, oil for lubricating the chain, approximately ten wedges, and various minor tools.

For the first part of 1951, the taxpayer used a 1947 Cadillac to carry this equipment and to drive back and forth from Fort Bragg to the log site. About the middle of the year he purchased for $125 an old Plymouth and used that as a means of conveyance for the greater part of the latter half of the year. However, when the Plymouth broke down and could not be used, taxpayer used the Cadillac. In December of 1951, the company discontinued its logging operations for the year and taxpayer was laid off.

In 1954, taxpayer was employed in the first part of the year for the Christie Company, and worked at two different log sites during that period. He daily travelled approximately 30 to 35 miles in an easterly direction from Fort Bragg in the first part of 1954 to each of these log sites.

In the second half of the year, he worked for another company at three different log sites. All of these were in a southeasterly direction from Fort Bragg and were approximately 30 miles from Fort Bragg. His operations in 1954 were similar to those in 1951, except that he used a jeep to transport the tools and himself to the various log sites. On some occasions in 1954 when the jeep was not operating, he used the 1947 Cadillac. In order to get to each of the log sites, taxpayer was required to use a public road for a portion of the way and to then proceed over about 6 to 9 miles of logging road for the balance of the trip.

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At each of the log sites worked by the taxpayer in 1951 and 1954, the logging operations were discontinued at the instance of the company.

No public transportation was available into the woods to get to the log sites, and no transportation was provided by any of the companies for which the taxpayer worked. During 1954 taxpayer worked at either four or five different log sites. It apparently could not be determined in advance just how long the work would last at each log site.

The pertinent provisions of the 1939 Internal Revenue Code are as follows:

Section 23.

"Deductions From Gross Income.

In computing net income there shall be allowed as deductions:

(a) Expenses.

1. Trade or Business Expenses.

A. In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *

* * *

(1) Depreciation.—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income."

Section 24. Items Not Deductible.

"(a) General Rule. In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses, * * *"[1]

The Tax Court held that the taxpayer's use of the automobiles and jeep to travel between Fort Bragg and the log sites was for the dual purpose of commuting between his home and his work and for transporting tools and equipment used by him in his employment. The Tax Court further held that to the extent that the automobile and jeep expenses in question represented commuting expenses of the taxpayer, they were personal expenses and were not deductible as ordinary and necessary business expenses.

The question of the deductibility of traveling expenses under various circumstances has been considered in a great number of cases.

In Emmert v. United States, (Ind. 1955), 146 F.Supp. 322, the plaintiff, James A. Emmert, was a judge of the Supreme Court of the State of Indiana. By law he was required to reside in the judicial district from which he was elected. However, he was required to attend the sessions of the Court which were held in Indianapolis, in another judicial district, some 30 miles away. The Court held that it was proper for the plaintiff to deduct the traveling expenses from his home town to Indianapolis. In the calendar year 1948 (the year in question) Judge Emmert made 221 such trips.

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[1] These provisions were carried over, without substantive change, to the 1954 Code. See 26 U.S.C.A., §§ 162(a) and 162(a)(2); 26 U.S.C.A. § 167(a).

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In Schurer v. Comm., 1944, 3 T.C. 544, where the employment of the taxpayer away from his home has been "temporary" traveling expenses have been permitted to be deducted. Thus, in Schurer petitioner was a journeyman plumber resident in Pittsburgh, Pennsylvania, where he had a wife and family. In 1941 he was requested by his union to work for four weeks in another Pennsylvania town. Shortly thereafter, he accepted employment from his union at Aberdeen, Maryland, where he worked for nine weeks. Shortly thereafter, he was requested to go to Morgantown, West Virginia, to assist in the construction of an ammonia plant. He worked there for a period of 33 weeks, after which he returned to Pittsburgh. The Commissioner disallowed his expenses at these three places and his traveling expenses from Pittsburgh to these locations and back again. The Tax Court held that the petitioner was entitled to deduct from his gross income the amount spent for meals and lodging and for railroad and bus fares while away from his home in Pittsburgh.

In Leach v. Commissioner, 1949, 12 T.C. 20, the facts show that the petitioner was employed during the year 1945 by a construction company to erect structural steel. He had no station or regular place of employment during 1945. His employment required him to be away from his home for 49 weeks during 1945, and to be, for short periods ranging from a few weeks to several months, at various places so remote from his home that he had to rent lodging for himself at each place. The Court said:

> "He could not move his wife and child to these places because of the shortness and indefiniteness of the duration of each job and the unavailability of accommodations."

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The Court said:

> "The petitioner had no regular post of duty or place of regular employment during 1945 away from Florence which could be called his 'home' or which he could be required to regard as his home for the purpose of Sec. 23(a)(1)(A). None of the places at which he had temporary employment during that year was his home. The expenses (lodging only) were unavoidable, reasonable and necessary expenses while away from his 'home' in the pursuit of his trade."

In York v. C.I.R. (D.C. 1947), 160 F.2d 385, the petitioner was a lawyer who went from Atlanta, Georgia, to Washington, D.C., to work. He later brought his family to Washington. The Court held that his expenses in Washington until the family arrived, and the expense of moving his family were *not* deductible. The Court said they were not incurred (1) "in carrying on a trade or business, or (2) for the production or collection of income."

The subject of deductibility of traveling expenses was considered by the Supreme Court of the United States in Commissioner v. Flowers, 1946, 326 U.S. 465. The Court there, after discussing the particular facts of that case, set out three conditions that should be fulfilled to entitle a taxpayer to a deduction for this reason. The Court stated:

> "Three conditions must thus be satisfied before a traveling expense deduction may be made under § 23(a)(1)(A):

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(1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.

(2) The expense must be incurred 'while away from home.'

(3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade."

Concerning the meaning of the word "home" as used in the statute, the Court stated:

"The meaning of the word 'home' in § 23(a)(1)(A) with reference to a taxpayer residing in one city and working in another has engendered much difficulty and litigation. 4 Mertens, Law of Federal Income Taxation (1942) § 25.82. The Tax Court and the administrative rulings have consistently defined it as the equivalent of the taxpayer's place of business. See Barnhill v. Commissioner, supra (C.C.A. 4). On the other hand, the decision below and Wallace v. Commissioner, 144 F.2d 407 (C.C.A. 9), have flatly rejected that view and have confined the term to the taxpayer's actual residence. See also Coburn v. Commissioner, 138 F.2d 763 (C.C.A. 2).

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> "We deem it unnecessary here to enter into or to decide this conflict. The Tax Court's opinion, as we read it, was grounded neither solely nor primarily upon that agency's conception of the word 'home.' Its discussion was directed mainly toward the relation of the expenditures to the railroad's business, a relationship required by the third condition of the deduction. Thus even if the Tax Court's definition of the word 'home' was implicit in its decision and even if that definition was erroneous, its judgment must be sustained here if it properly concluded that the necessary relationship between the expenditures and the railroad's business was lacking. Failure to satisfy any one of the three conditions destroys the traveling expense deduction."

The question was again considered in Peurifoy v. Commissioner of Internal Revenue, 1958, 358 U.S. 59. There, three petitioners were employed as construction workers at a site in Kinston, North Carolina, for continuous periods of 20½ months, 12½ months and 8½ months, respectively, ending in the year 1953. There was no evidence that the employment of any petitioner was terminated by the employer, two having quit for personal reasons and the third for an undisclosed reason. Each of the petitioners maintained a permanent residence elsewhere in North Carolina. In reporting his adjusted gross income for 1953, each petitioner deducted amounts expended for board and lodging and tips during the period of employment there, and for transportation from Kinston to his permanent residence upon leaving that employment. These deductions were disallowed by the Commissioner. Thereafter, the Tax Court rendered a decision in favor of the petitioners, 27 TC 149. The Court of Appeals reversed. The Supreme Court stated:

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"Generally, a taxpayer is entitled to deduct unreimbursed travel expenses under this subsection only when they are required by 'the exigencies of business.' Commissioner v. Flowers, supra . . .

"To this rule, however, the Tax Court has engrafted an exception which allows a deduction for expenditures of the type made in this case when the taxpayer's employment is 'temporary' as contrasted with 'indefinite' or 'indeterminate.'"

The Court further stated:

"Resolution of this case as presented to us turns, therefore, upon a narrow question of fact—Was the petitioners' employment 'temporary' or 'indefinite'? The Tax Court, stating that 'each case must be decided upon the basis of its own facts and circumstances,' . . . found that their employment was temporary. The Court of Appeals, also recognizing that the question was 'one of fact' held that on the record the Tax Court's finding of temporary employment was 'clearly erroneous.'

* * * * *

"In reviewing the Tax Court's factual determination, the Court of Appeals has made a fair assessment of the record. . . . That being so, this Court will not intervene."[2]

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[2] In the Peurifoy case, three Justices dissented. Justice Douglas, speaking for the minority, stated:

"I disagree with the Commissioner's contention that 'home' is synonymous with the situs of the employer's business. Such a construction means that the taxpayer who is forced to travel from place to place to pursue his trade must carry his home on his back regardless of the fact that he maintains his family at an abode which meets all accepted definitions of 'home'. I do

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The question of the deductibility of traveling expenses under various circumstances was discussed in Treasury Department Publication No. 300 (Par. 76,425) 1956 Prentice-Hall Federal Taxes. There, the Treasury Department stated that the

> "* * * cost of transportation between your residence and your place of employment or business, including commuting expenses, are not deductible *except in special circumstances*" (Emphasis supplied)

and that

> "* * * travel expenses do not include * * * the cost of commuting between the hotel or other place where meals and lodging are obtained and the business location where the services are performed,"

but that

> "* * * however, if the location where the services are performed while on a business trip is in a remote area and you must stay at a considerable distance therefrom (for example, 10 to 15 miles) in order to obtain necessary living accomodations, the expense incurred for necessary transportation may be deducted.

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not believe that Congress intended such a harsh result when it provided a deduction for traveling expenses. These construction workers do not have a permanent locus of employment as does the merchant or factory worker. They are required to travel from job to job in order to practice their trade. It would be an intolerable burden for them to uproot their families whenever they change jobs, if those jobs happen to take them to a different locality."

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> "If you are required to work at a temporary or minor location outside the general area which is your 'tax home', your transportation expenses for daily round-trips from that area to such temporary or minor post of duty are deductible."

It has been consistently held that a taxpayer's "commuting" expenses from his residence to his place of employment are not deductible. Commissioner v. Flowers, 1946, 326 U.S. 465; Ney v. United States (8th 1948), 171 F.2d 440; Commissioner v. Janss (8th 1958), 260 F.2d 99; Donnelly v. Commissioner (2nd 1959), 262 F.2d 411. However, Webster defines "commute" to mean "to travel by use of a commutation ticket, especially daily to and from a city; hence, to travel especially daily to one's work back and forth between a city and one's suburban residence".

The fact that a taxpayer chooses to live in a particular city or location which is different from where he works does not permit him to take a tax deduction for travel between his work and his residence. An exception, however, has been made to the above rule when the work of a taxpayer has been temporary as distinguished from indefinite.

This was the distinction that was made by the Circuit Court in Peurifoy and upheld by the Supreme Court.

[2, 3] No case involving the same factual situation as is shown in the instant case has been brought to our attention.

In this case, there was the necessity of traveling back and forth to the "layout", although the necessity was caused not by the law, as in Emmert, but by the lack of living accommodations at the log sites and by the necessity of carrying tools back and forth to be repaired. Here, also, the work locations were temporary, there being seven of

these locations in the two-year period. Here, also, the length of time of the work at the various locations was not determined by the taxpayer, but was determined by his employer, depending upon the amount of logs to be cut.

Here, also the taxpayer did not have a choice of living at the job-site or at his regular home as the petitioner did in Flowers, supra, and in York, supra, and in Ney, supra.

The contention of the respondent that the tax home of the taxpayer was at the seven different layouts in the woods does not appear realistic to us. His residence in Fort Bragg was in a central location to all of the layouts; to some he had to go north, to others he had to go east, to others he had to go south from Fort Bragg.

The necessity of daily transporting his tools from his layout in the woods, to Fort Bragg, for the purpose of repair or replacement, appears important to us. This was a business necessity, rather than a personal necessity. Of course, he could not know what part or tool would break or when it would require repair or replacement. Whenever that happened, however, he was required to transport it by jeep or car for such repairs or replacement as might be necessary. His work stopped if this was not done.

We believe that the automobile and the jeep expenses in this case came within the language of Sec. 23.

The automobile and jeep were used "while away from home in the pursuit of a trade or business." They were property "used in the trade or business." The operating expenses of the automobile and jeep were "ordinary and necessary expenses paid or incurred . . . in carrying on the trade or business of the taxpayer." We do not believe that they could be called "personal living or family expenses."

We believe, further, that the three requirements set out in Flowers, supra, have been fulfilled, and that the travel

Excerpt from the Memorandum for the Respondent in John J. Tyne, Jr. v. Commissioner of Internal Revenue, 385 F.2d 40, in the United States Court of Appeals for the Seventh Circuit, pages 6-7.

expenses here have been required, as said in Flowers, "by the exigencies of business."

We believe that "special circumstances" mentioned in Treasury Department Publication No. 300 exist in this case.

The decision is reversed and the case is remanded to the Tax Court with directions to determine and allow to petitioners, for 1951 and 1954, the amount of auto and jeep expenses incurred in travelling in those years from Fort Bragg to the various "lay outs" at which taxpayer worked.

Excerpt from the Memorandum for the Respondent in *John J. Tyne, Jr. v. Commissioner of Internal Revenue*, 385 F. 2d 40, in the United States Court of Appeals for the Seventh Circuit, pages 6-7.

It is respectfully submitted that the allocation rule should not be followed. It appears to be at variance with the general approach taken throughout the transportation expense area and with Rev. Rul. 63-100. Moreover, the allocation rule would require difficult *ad hoc* allocations between transportation expenses attributable to carrying the tax payer's person and transportation of the tools of his trade. See, in this respect, the instant taxpayer's discussion concerning the practical impossibility of implementing the allocation test laid down by the Second Circuit in *Sullivan* v. *Commissioner*, 368 F. 2d 1007. Finally, if the amount of the transportation expense is the same regardless of whether it is occasioned by personal reasons, by business reasons or by both, allocation would seem to be impractical.

Notice of Deficiency of the Commissioner of Internal Revenue

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
District Director
P. O. Box 3100
New York, N. Y. 10015

In Reply Refer to
Form L-21
AU:R:90D

May 12, 1964

Taxable Year Ended—12/31/62
Deficiency—$540.10

Mr. Lawrence D. Sullivan
18 Ocean Road
Staten Island 8, New York

Dear Sir:

In accordance with the provisions of existing internal revenue laws, notice is given that the determination of your income tax liability for the above-noted taxable year(s) discloses a deficiency (or deficiencies) in the amount shown above. The attached statement shows the computation of the deficiency or deficiencies.

IF YOU AGREE to this determination, please sign the enclosed agreement, Form 870, and return it promptly to this office. An addressed envelope is enclosed for this purpose. The signing and filing of this agreement will permit an early assessment of the deficiency or deficiencies and will limit the accumulation of interest.

IF YOU DO NOT AGREE, and do not sign and return the enclosed form, the deficiency or deficiencies will be assessed for collection, as required by law, upon the expiration of ninety days from the date of this letter, unless within that time you contest this determination in the Tax Court of the

Notice of Deficiency of the Commissioner of Internal Revenue

United States by filing a petition with that Court in accordance with its rules, a copy of which may be obtained by writing to its Clerk, Box 70, Washington 4, D. C.

Very truly yours,

MORTIMER M. CAPLIN
Commissioner

By Charles A. Church
CHARLES A. CHURCH
District Director

Enclosures—
Statement
Agreement, Form870
Addressed envelope

(Rev. Dec. 1961)
Form 2947

U. S. TREASURY DEPARTMENT—INTERNAL REVENUE SERVICE

SHORT-FORM STATEMENT

Date of Report of Examination—11/5/63
Date Report Mailed to You—11/6/63
Tax Liability for Taxable Year(s) Ended—12/31/62
Type of Tax—Income
Name and Address of Taxpayer(s)—
Lawrence D. Sullivan
18 Ocean Road
Staten Island 8, New York

Year—1962
Deficiency—$540.10

The above deficiencies are based on adjustments and explanations as disclosed in the report of examination, a copy of which was forwarded to you on the date shown above.

SUPREME COURT, U. S.

No. 195

JUL 2 1969

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969

LAWRENCE D. SULLIVAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

JOHNNIE M. WALTERS,
Assistant Attorney General,

MEYER ROTHWACKS,
HOWARD M. KOFF,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1969

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LAWRENCE D. SULLIVAN, PETITIONER

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (Pet. 2a-8a) are not officially reported. The court of appeals affirmed without opinion. (Pet. 1a.)

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1969. (Pet. 1a.) The petition for a writ of certiorari was filed on June 4, 1969. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, and to what extent, petitioner is entitled to a deduction for transportation expenses incurred while driving his car, with some thirty-two pounds of tools in it, between his residence and his work sites.

STATUTE INVOLVED

The pertinent portions of Sections 162(a) and 262 of the Internal Revenue Code of 1954 are printed in the Appendix, *infra*, p. 6.

STATEMENT

In 1965 the Tax Court (45 T.C. 217) sustained the Commissioner's determination and held that petitioner was not entitled to any deduction on his 1962 income tax return for transportation expenses, assertedly $1,494.72, incurred in driving his car to and from his residence and various work sites. (Pet. 13a-20a.) Petitioner had claimed a deduction was justified because he transported a tool bag measuring some 6 x 18 x 24 inches and weighing about 32 pounds. (Pet. 14a.)

On appeal, the Second Circuit rejected the total deduction petitioner claimed but reversed the Tax Court's decision and remanded the case. The Tax Court was directed to determine first whether it was necessary for petitioner to transport his tools to and from work, and if so and storage of the tools was feasible, the cost of storage was to represent the

maximum allowable deduction. Second, the Tax Court was to determine whether petitioner would have driven to work "but for" the necessity of transporting the tools; if not, respondent was to be allowed a tool transportation deduction subject to the above maximum; if so, the expenses were to be allocated between the cost of transporting petitioner himself and his tools, again subject to the above maximum. Third, assuming that storage was not feasible and that petitioner would have driven to work regardless, the Tax Court was to determine how much of the claimed deduction constituted reasonable transportation expenses. (Pet. 9a-12a.)

On remand, petitioner conceded that the total transportation expense in 1962 was only $409.70. (Pet. 3a.) Some additional evidence was introduced. The Tax Court found, *inter alia*, that it was necessary for petitioner to transport the tools to and from work, that storage was not feasible and that petitioner would have driven to work even if it had not been necessary to transport the tools. On the basis of the latter finding, and pursuant to the Second Circuit's direction, the Tax Court allocated one third of the expenses, or $136.57, to the transportation of the tools (Pet. 2a-8a). The Second Circuit affirmed without opinion (Pet. 1a).

ARGUMENT

The decision below does not deny petitioner any deduction to which he is entitled. There is no conflict of decisions or other ground for further review.

1. Once it is determined that a taxpayer would drive to work regardless of the need for transporting tools, his driving is commuting and nothing else. There is simply no basis for deducting any expenses. See *United States* v. *Correll*, 389 U.S. 299, 303; compare Rev. Rul. 63-100, 1963-1 Cum. Bull. 34.

To hold, as the courts below now have, that one third of the driving costs are allocable to carrying petitioner's tools and deductible is generous in the extreme, in view of the Tax Court's finding that petitioner would have driven his car to work in any event, and petitioner's concession on brief below that the tool transportation did not increase his driving expenses. No conceivable theory would justify a larger deduction.

2. The decision here is consistent with the other appellate decision on point, *Tyne* v. *Commissioner*, 385 F. 2d 40 (C.A. 7). The Seventh Circuit reversed the Tax Court, which had denied any deduction for tool transportation, and remanded the case with instructions that the Commissioner of Internal Revenue determine a proper allocation for that purpose. On remand, the Commissioner determined that 50 per cent of the total expenses was allocable to tool transportation, and the Tax Court found accordingly. A second appeal was taken in which the Seventh Circuit again reversed and remanded for a determination whether the taxpayer had satisfied the "but for" test of Rev. Rul. 63-100, *supra*, in which event, in the appellate court's view, he would be entitled to a 100% deduction for the expenses incurred.

3. There is not a conflict with *Crowther* v. *Commissioner*, 269 F. 2d 292 (C.A. 9). Although that case did involve the transportation of tools, the decision turned on whether taxpayer was entitled to deduct "traveling expenses * * * while away from home," within the meaning of Section 162(a)(2) of the Internal Revenue Code of 1954 (as the Ninth Circuit subsequently made clear in *Mathews* v. *Commissioner*, 310 F. 2d 98). Here, concededly, petitioner did not incur the claimed transportation expenses "while away from home."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

MEYER ROTHWACKS,
HOWARD M. KOFF,
Attorneys.

JULY 1969.

APPENDIX

Internal Revenue Code of 1954:

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

* * * *

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and

* * * *

(26 U.S.C. 162.)

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

(26 U.S.C. 262.)

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IN THE

Supreme Court of the United States

October Term, 1969

No. 195

LAWRENCE D. SULLIVAN,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

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212—LE 5-4195

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

Reasons for this Reply Brief

This Reply Brief is addressed to the following arguments first raised in the brief in opposition:

1. The respondent reverts to the outset of the present litigation, contradicting itself, the Court of Appeals and established rules.

2. Contention, that the decision here is consistent with *Tyne* v. *Commissioner*, 385 F. 2d 40 (C.A. 7).

3. Contention, that there is no conflict with *Crowther* v. *Commissioner*, 269 F. 2d 292 (C.A. 9).

4. Some additional evidence was introduced on remand.

5. The concept of generosity.

6. Petitioner conceded, that the total transportation did not increase his driving expenses.

7. Respondent avers, that *Crowther* was overruled.

8. The numerical cost of driving the car is irrelevant.

Argument

1. The respondent squarely contradicts himself by stating that

> "Once it is determined that a taxpayer would drive to work regardless of the need for transporting tools, his driving is commuting and nothing else. There is simply no basis for deducting any expenses."

though he ruled

> "Where it is necessary for a musician to use his automobile to transport his musical instruments between his residence and his place of work because they are too bulky to be carried otherwise, and he would not use his automobile on such trips except for that reason, his transportation expenses are deductible under section 162 of the Internal Revenue Code of 1954." Rev. Rul. 63-100 (Cum. Bull. 1963-1, page 34),

the full text of which is printed in the Appendix, *infra*, page 9.

The Tax Court of the United States in its original decision of the case at bar was

> "* * * of the opinion that all such trips by an employee between his home and place of employment are personal commuter trips, whether he carries no tools, one small tool, or a car full of the tools of his trade." Pet. 19a.

This opinion of the Tax Court was found by the Court of Appeals to be error, to be in conflict with § 162 of the Code of Internal Revenue and with Rev. Rul. 63-100. 368 F.2d 1007 (CA 2, 1966) appendix to the petition 9a).

Even

> "The Commissioner concedes on this appeal that so sweeping a disallowance was error." Pet. 11a first sentence of the second paragraph.

Respondent now reverts to the beginning of the present litigation, thereby establishing an insecurity in law, a legal chaos, to the effect, that no taxpayer in the United States can know, nor even guess, when preparing his tax return what is right or wrong: *Crowther,* or Rev. Rul. 63-100—which is long since overruled—or *Sullivan,* 45 T.C. 217, or the Court of Appeals 368 F. 2d 1007. Thus, the respondent by his brief fortified the need, if not really craved, for the decision of the issue by supreme judicial authority. He also collided with *Flowers,* 326 U.S. 465.

2. Respondent contends that

> "The decision here is consistent with the other appellate decision on point, Tyne v. Commissioner, 385 F. 2d 40 (C.A. 7)."

He would have hardly said so, if he would be aware, that *Tyne* filed a petition for a Writ of Certiorari in the Supreme Court No. 281. Moreover, one of the main reasons for Tyne's petition is its contradiction to Sullivan's instant case.

Among others, the *Government* in *Tyne* expressly "submitted that the allocation rule should not be followed" (Pet. 36a), whereas in the case at bar the brief in opposition clings to it. There is no "allocation rule" only a hollow mandate to the Tax Court to create one, which however was not created.

So respondent's reliance in the consistency of these two cases is nonexistent.

3. Respondent further alleges, that

> "There is not a conflict with *Crowther*" because that "decision turned on whether taxpayer was entitled to deduct 'traveling expenses * * * while away from home',"

whereas petitioner in the case at bar

> "did not incur the claimed transportation expenses 'while away from home'."

Transportation *not* away from home, in the pursuit of business, however, is deductible:

> "*Transportation expenses.*—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of transportation paid or incurred by the taxpayer in connection with the performance by him of services as an employee." § 62(2)(C) of the Internal Revenue Code of 1954.

Therefore nothing is accomplished by pinpointing that *Crowther* was away from home, whereas petitioner was not. The quoted § 62(2)(C) does away with any difference between travel, if in the pursuit of business away from or not away from home, except meals and lodgings.

The reference to *United States* v. *Correll,* 389 U.S. 299, 303, possibly refers to the remark

> "Any rule in this area must make some rather arbitrary distinctions,"

which is inapplicable in the case at bar. Not only because *Correll* deals with meals and lodgings, but because the issue in the case at bar is the legality of allocation between transportation of the petitioner and of his tools, irrespective of the arbitrariness or unarbitrariness of that allocation.

4. It is not clear what ends would be served by stating that

> "Some additional evidence was introduced,"

on remand. For the reason of completeness it is observed, that the only "evidence" was the testimony of a secretary of petitioner's employer whose testimony was discredited by the Tax Court for being hearsay.

5. The brief in opposition contends that ⅓ of the driving cost "is generous in the extreme." There is no rule in the Statutes, or a principle in the decisions of the courts which would allow or depend on or have regard to generosity. If there would be one: the petitioner at bar would not request and would not accept any generosity, he only claims what is due to him, and nothing else.

6. It would amount to sheer nonsense to state that an additional 32 pounds (as in *Sullivan*) increases the operating cost of a car. What is obvious, cannot be conceded. Concession means to agree to something, which is or can be controverted.

7. The decision of the Ninth Circuit in *Crowther* v. *Commissioner*, 269 F. 2d 292 stands for itself. Respondent alludes to that dictum in *Mathews* v. *Commissioner*, 310 F. 2d 98:

> "We do not think that our decision in Crowther depended upon the fact that the taxpayer in that case was required to carry his tools into the woods with him."

This cannot be taken as invalidating of the holding in *Crowther* recited on page 7 of the petition, in the case at bar, *i.e.*, that "the necessity of transporting his tools * * * was a business necessity rather than a personal necessity" and that this characterized "the operating expenses of the automobile and jeep" to be "ordinary and necessary expenses paid or incurred * * * in carrying on the trade or business of the taxpayer."

If the Mathews case would overrule *Crowther*, this would amount to discarding the commutation rule; transportation to the work site without tools is not discernible from commutation. Consequently we feel, that *Crowther* stands, and it is based on the necessity of carrying tools to the work sites.

In this connection the respondent calls the attention to that

"There is not a conflict with *Crowther*."

Crowther went from his home to his work site; same as *Sullivan*. *Crowther* went 30 to 40 miles each way outside the tiny spot Fort Bragg; *Sullivan* went 5.25 to 6 miles each way inside the metropolis of New York. Does quantity of distance result in a qualitative difference? Because if not, then the fact that the distances are in the country or within the metropolis cannot cause legal differences.

8. The case at bar prays for enunciation of a principle and not to contest an insignificant amount of tax already paid. Nothing is achieved by depicting an abrupt decrease of the total transportation expense from $1,494.72 to $409.70. But for the sake of completeness may it be stated, that petitioner claimed in his main brief to the Tax Court—that is the original proceeding and not on remand—pages 13 to 15, that his driving expenses were in the amount of $409.70, and not $1,494.72. This latter figure was an error by respondent.

CONCLUSION

For all the foregoing reasons, a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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No. 51 East 67th Street
New York, N.Y. 10021
212—LE 5-4195

September 1969

(APPENDIX)

Rev. Rul. 63-100 (CB 1963-1, 34)

"Where it is necessary for a musician to use his automobile to transport his musical instruments between his residence and his place of work because they are too bulky to be carried otherwise, and he would not use his automobile on such trips except for that reason, his transportation expenses are deductible under section 162 of the Internal Revenue Code of 1954.

Such transportation expenses are ordinary and necessary expenses paid or incurred in carrying on his trade or business because they are occasioned primarily by the necessity for transporting bulky musical instruments even if such expenses would otherwise be nondeductible commuting expenses.

Whether transportation expenses are incurred primarily for business or personal reasons is a question of fact to be determined in each case.

Revenue Ruling 56-25, C.B. 1956-1, 152, states that expenses incurred by an employee in using his automobile for commuting between his place of abode and his principal or regular place of work represent nondeductible personal expenses notwithstanding the fact that the automobile is also used to transport tools used by the employee in his work. That ruling is hereby modified to remove the implication that such transportation expenses would not be deductible even if the employee would not have used his automobile on such trips but for the necessity of taking his tools with him."